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## Chapter Eleven

### A Feminist Human Rights Perspective on the Use of Internal Relocation by Asylum Adjudicators

Nora Honkala

My first encounter with Professor Sandy Ghandhi was as a master's student in his module on international human rights. Indeed, it was *his* module. This is not just a cliché but also one that is demonstrative of his relentless belief in human rights being the idea of our time. Sandy taught the module inspirationally, seamlessly pulling together the immensity of theory and practice concerning the field, making it not only educational but also thoroughly enjoyable. Sandy's exceptional experience, intellectual rigour and capacity for hard work are often modestly hidden behind his casual charm and wit. As my doctoral supervisor and mentor, Sandy never waned in his enthusiasm for engaging with justice, finding words of encouragement during my moments of despair; and, most of all, for giving me the space to make up my own mind. I am fortunate to have begun my academic career under Sandy's mentorship.

#### I.). Introduction

Women's refugee claims often concern complex human rights violations that necessitate a nuanced interpretation and application of refugee law. The United Nations High Commission for Refugees (UNHCR) offers guidance to adjudicators to take a liberal and humanitarian spirit in light of the object and purpose of the 1951 Refugee Convention. In this chapter, I examine the jurisprudence from two appellate level decisions: *FB* (Lone Women-PSG-internal relocation-AA (Uganda) considered) Sierra Leone [2008] UKAIT 00090<sup>1</sup> and *HC & RC* (Trafficked Women) China CG [2009] UKAIT 00027.<sup>2</sup> In both cases the adjudicators

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<sup>1</sup> Hereinafter *FB* (*Sierra Leone*).

<sup>2</sup> Hereinafter *HC & RC* (*China*).

found there to be ‘persecution’ within the meaning of the Refugee Convention, but dismissed the appeals based on the availability of an internal relocation option.

In this chapter I seek to critique the adjudicators’ reasoning with regard to the internal relocation option and argue that this reasoning evidences a problematically restrictive application of refugee law and process. Evidence from the two cases reveals that the reasoning does not adequately take into account the socio-legal realities of the nature of the asylum seeker women’s human rights violations. As such, the chapter concludes that the interpretation of the law evident in these decisions falls short of the standard of taking into account the overall object and purpose of the Convention, as well as the general human rights context. What is proposed is to engage with the feminist critiques in order to understand the discrimination that such an approach can cause.

## **II.) International Refugee Law Framework**

The 1951 UN Convention Relating to the Status of Refugees and its 1968 Protocol form the foundations of the international refugee protection regime. Today, the Convention has 145 State party signatories and remains the sole international legally binding instrument that gives protection to refugees. The definition of a refugee contained in the Convention is one of the most widely-accepted international norms, and one that has also made its way into public consciousness.<sup>3</sup> Even though the Refugee Convention and its Protocol do not require the definition to be adopted by States, many nonetheless employ it in their domestic asylum systems.<sup>4</sup> The Convention defines a refugee as a person who

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to

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<sup>3</sup> Daniel J. Steinbock, “The Refugee Definition as Law: Issues of Interpretation,” in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, edited by Frances Nicholson and Patrick Twomey (Cambridge: Cambridge University Press, 1999): 13-36, at 13.

<sup>4</sup> James C. Hathaway, “A Reconsideration of the Underlying Premises of Refugee Law” *Harvard International Law Journal* 31 (1990): 129.

avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>5</sup>

When a State makes a refugee status determination, the asylum seeker must prove that she has a well-founded fear of being persecuted *for reasons of* one or more of the enumerated Convention Grounds: race, religion, nationality, membership of a particular social group or political opinion. Persecution must be shown. A commonly accepted method is to show this by finding both “serious harm” and the “failure of State protection”.<sup>6</sup> It is important to remember that the object and purpose of the Refugee Convention are humanitarian. As stated in its preamble, the goal of the Convention is to “assure refugees the widest possible exercise of these fundamental rights and freedoms...without discrimination”.

The particular ways in which international refugee law is applied can have significant gendered consequences for the claims of many women. Although women can of course suffer from the same kinds of persecution as men, there is evidence that women have been unable to benefit equally from the protection afforded by the Refugee Convention.<sup>7</sup> Women’s claims thus necessitate an understanding of the particular implications of gender in relation to their claims. There can be said to be two main ways in which women may not be afforded equal treatment under the Refugee Convention: first, that the usual interpretation of the Convention marginalises women’s experiences and, secondly, that procedural and evidential barriers can decrease the quality of the decision-making process.<sup>8</sup> This chapter is concerned with the first of these obstacles.<sup>9</sup>

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<sup>5</sup> Convention Relating to the Status of Refugees 1951, art. 1 A (2).

<sup>6</sup> Hathaway, *supra* note 4, at 129.

<sup>7</sup> Heaven Crawley, *Refugees and Gender: Law and Process* (Bristol: Jordans, 2011): 5.

<sup>8</sup> *Ibid.*

<sup>9</sup> For thorough investigation into quality of initial decision-making in the UK, including the procedural barriers, see Helene Muggeridge and Chen Maman, “Unsustainable: The Quality of Initial Decision-Making in Women’s Asylum Claims,” *Asylum Aid*, January 2011, <http://www.asylumaid.org.uk/wp-content/uploads/2013/02/unsustainableweb.pdf>.

### III.) Feminist Engagement with International Refugee Law

The problems with the interpretation of the Refugee Convention stem from the fact that the Convention remains deeply rooted in its history. At the time of the drafting of the Convention, the relevance of gender was only discussed once.<sup>10</sup> The Yugoslav delegate proposed that the category “sex” be included in Article 3, which states that the Convention shall be applied “without discrimination as to race, religion or country of origin”.<sup>11</sup> However, this suggestion was rejected as the feeling at the time was that “the equality of the sexes was a matter for national legislation”.<sup>12</sup> The Chairman of the drafting committee, the UN High Commissioner for Refugees Van Heuven Goedhart, strongly doubted whether there would ever be any cases on account of sex.<sup>13</sup> Refugee women thus remained mostly invisible until the 1980s.

It was largely due to NGOs, feminist activists and academics that this invisibility of women asylum seekers was exposed and brought onto the international agenda. Feminists have indeed been criticising the supposed gender neutrality of the refugee definition since the 1980s.<sup>14</sup> The ways in which the Refugee Convention has been interpreted, particularly in Western industrialised States, have been heavily influenced by the historical context of the Convention itself. The model of the Convention’s refugee definition is a sole, male, political exile, who was considered to be the main casualty of the Cold War era.<sup>15</sup>

Many women’s claims do not fit this model and the fact that gender is not included as a Convention ground has been controversial. Feminists like Jane Freedman have argued that the absence of gender as a sixth category has meant that gender-related persecution has been

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<sup>10</sup> Thomas Spijkerboer, *Gender and Refugee Status* (Aldershot: Ashgate, 2000): 1.

<sup>11</sup> Spijkerboer, *supra* note 10, at 1.

<sup>12</sup> *Ibid.*, quoting the British delegate.

<sup>13</sup> *Ibid.*

<sup>14</sup> For example, Doreen Indra, “Gender: A Key Dimension of the Refugee Experience,” *Refuge* 6, 3 (1987); and Jacqueline Greatbatch, “The Gender Difference: Feminist Critiques of Refugee Discourse,” *International Journal of Refugee Law* 1 (1989): 517.

<sup>15</sup> Jacqueline Bhabha and Sue Shutter, *Women’s Movement: Women under Immigration, Nationality and Refugee Law* (London: Trentham Books, 1994).

trivialised, and demonstrates that it has not been taken as seriously as other forms of persecution on the basis of race, religion, nationality or political opinion.<sup>16</sup> On the other hand, it has also been argued that a separate category might lead all persecution done to women being “pigeon-holed”, leading to perceptions that women’s persecution is always something fundamentally different from that of men, and – by inference – something less important.<sup>17</sup> It is generally accepted, however, that the international climate is not conducive to the expansion of the refugee definition by way of including gender as a sixth category.<sup>18</sup> It is therefore imperative that the refugee convention is interpreted in a manner that is inclusive and gender sensitive. Bhabha, Crawley and Goldberg have all argued for a more inclusive approach to defining what constitutes persecution.<sup>19</sup> The problem then is not the Convention definition but the way in which women’s experiences are actually “represented and analytically characterised”.<sup>20</sup> The cases of *FB (Sierra Leone)* and *HC & RC (China)* both show how the adjudicators use restrictive interpretation of the internal relocation principle and ignore the socio-legal realities of the women’s experiences.

#### IV.) Gender and Internal Relocation Option

“A loved child has many names”.<sup>21</sup>

The terms *internal relocation*, *internal protection*, *internal flight alternative*, *internal flight option*, and *internal relocation option* all refer to a State created legal concept that in the 1980s quickly rose to become a stable hurdle in the refugee determination process. Albeit

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<sup>16</sup> Jane Freedman, *Gendering the International Asylum and Refugee Debate* (London: Palgrave Macmillan, 2007): 75.

<sup>17</sup> *Ibid.*

<sup>18</sup> Emily Copeland, “A Rare Opening in the Wall: The Growing Recognition of Gender-Based Persecution,” in *Problems of Protection: The UNHCR, Refugees and Human Rights in the 21<sup>st</sup> Century*, edited by Niklaus Steiner *et al.* (London: Routledge, 2003): 101-116, 101.

<sup>19</sup> Jacqueline Bhabha, “Boundaries in the Field of Human Rights,” *Harvard Human Rights Journal* 15 (2002): 155; Heaven Crawley, “Engendering the State in Refugee Women’s Claims for Asylum,” in *States of Conflict: Gender Violence and Resistance*, edited by Susie M. Jacobs *et al.* (New York: Zed Books, 2000); Crawley, *supra* note 5; and Pamela Goldberg, “Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence,” *Cornell International Law Journal* 26 (1993): 565.

<sup>20</sup> Heaven Crawley, “Gender, Persecution and the Concept of Politics in the Asylum Determination Process,” *Forced Migration Review* 9 (2000): 17, 19.

<sup>21</sup> Scandinavian proverb.

through varied tests, States around the world have embraced the internal relocation option as a mechanism to deny and restrict international protection to asylum seekers. Given that women's asylum claims are more likely than men's to involve non-State agent persecution, women are disproportionately affected by the application of this option.

While the origins of the internal relocation option are not clear, what is often referenced is the UNHCR Handbook. The UNHCR in 1979 provided the following instructions:

The fear of being persecuted *need not* always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person *will not be excluded* from refugee status merely because he could not have sought refuge in another part of the same country, if under *all* the circumstances it *would not have been reasonable to expect him to do so*.<sup>22</sup>

It is evident from the instruction that it was meant to *deter* States from excluding persons from refugee status merely because they could have sought internal protection elsewhere within the country.<sup>23</sup> However, since the 1980s States have used this instruction very restrictively, if not in bad faith. States have interpreted the instruction to mean that exclusion from refugee status *may* be justified and that the inquiry could include a retrospective analysis (i.e., whether the asylum seeker could have sought refuge in another part of the same country).<sup>24</sup> The UNHCR has subsequently issued further instructions to States in the application of a two-stage test, first on the "relevance analysis" and then on the

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<sup>22</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, reedited January 1992, UNHCR, 1979, U.N. Doc. HCR/IP/Eng/REV.1, ¶ 91, emphasis added.

<sup>23</sup> James C. Hathaway and Michelle Foster, "Chapter 6.1: Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination," in *Refugee Protection in International Law; UNHCR's Global Consultations on International Protection*, edited by Erika Feller *et al.* (Cambridge: Cambridge University Press, 2003): 357- 417, 361.

<sup>24</sup> *Ibid.*, 362.

“reasonableness analysis”.<sup>25</sup> But as much as the UNHCR has since wanted to clarify the appropriate application of the internal relocation option, the instruction has taken on a life of its own, its dire consequences proving too difficult to rein in.

While the internal relocation option was not envisioned at the time of the drafting of the Refugee Convention, or indeed until around the 1980s when state policies regarding asylum were significantly more open, authorities in the field argue that the internal relocation option is consistent with international refugee law.<sup>26</sup> This is because, as Hathaway explains, “international protection is designed to provide a back-up source of protection” or surrogate protection to persons seriously at risk.<sup>27</sup> A refugee claims this international surrogate protection because her own state cannot or will not provide protection.<sup>28</sup> A refugee can rely on this surrogate protection when she has shown that there is a lack of State protection. With the task of harmonising European Union policy on asylum, internal relocation has now also become codified in EU law, in Article 8 of the Recast Qualification Directive.<sup>29</sup> The EU approach to what it terms the “internal protection alternative” has been criticised as not conforming to international law.<sup>30</sup>

The development of the doctrine in the UK has taken influences from both international jurisprudence and EU law. In the UK, internal relocation option developed

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<sup>25</sup> UNHCR, *Position Paper on Relocating Internally as a Reasonable Alternative to Seeking Asylum (The So-Called “Internal Flight Alternative” or “Relocation Principle”)*, 9 February 1999, <http://www.refworld.org/docid/3ae6b336c.html>, ¶¶ 13-14 and 15-17 respectively.

<sup>26</sup> James C. Hathaway, “International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative,” *Michigan Journal of International Law* 21 (1999): 131.

<sup>27</sup> Hathaway and Foster, *supra* note 23, 358.

<sup>28</sup> Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (London: Sweet & Maxwell, 2004): 328.

<sup>29</sup> Recast Qualification Directive 2011/95/EV, 13 December 2011, [http://www.ilga-europe.org/home/issues/asylum\\_in\\_europe/monitoring\\_eu\\_asylum\\_law/the\\_recast\\_qualification\\_directive\\_2011\\_95\\_eu](http://www.ilga-europe.org/home/issues/asylum_in_europe/monitoring_eu_asylum_law/the_recast_qualification_directive_2011_95_eu), 9.

<sup>30</sup> Hathaway and Foster, *supra* note 23. For a comprehensive analysis of the Recast Qualification Directive and its critique, see John Eaton, “The Internal Protection Alternative under European Union Law: Examining the Recast Qualification Directive,” *International Journal of Refugee Law* 24, 4 (2012): 765.



through three main cases: *Karanakaran*,<sup>31</sup> *Robinson*<sup>32</sup> and *Januzi*.<sup>33</sup> In *Karanakaran*, Sedley LJ explained that:

[...] in most cases, [...], it is in relation to the asylum seeker's ability or willingness to avail himself of his home State's protection that the question of internal relocation arises. Because, however, unwillingness is explicitly related to the driving fear, it predicates a different set of considerations from inability, which may be indicated or contraindicated by a much wider range of factors.<sup>34</sup>

In *Robinson*,<sup>35</sup> the Court of Appeal looked towards international jurisprudence in addressing the specific question of reasonableness of relocation. The Court was informed by the Canadian case of *Thirunavukkarasu*, where the question of whether it "would be unduly harsh to expect this person to move to another less hostile part of the country" was considered to be part of the test to measure the "reasonableness" of the internal relocation option.<sup>36</sup> Woolf LJ also enumerated various tests that had previously been applied within the UK context.<sup>37</sup> Of note for present purposes was the last of these: "if the quality of the internal protection fails to meet basic norms of civil, political and socio-economic human rights", relocation was considered to be unavailable.<sup>38</sup> This part of the test suits a position that Hathaway and Foster have argued for, that consideration should be firmly placed on international human rights law standards.

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<sup>31</sup> *Karanakaran v. Secretary of State for the Home Department* [2000] EWCA Civ 11.

<sup>32</sup> *R v. Secretary of State for the Home Department & Immigration Appeal Tribunal, ex parte Robinson* [1997] EWCA Civ 3090.

<sup>33</sup> *Januzi (FC) v. Secretary of State for the Home Department* [2006] UKHL 5.

<sup>34</sup> *Ibid.*, LJ Stedley ¶ 4.

<sup>35</sup> *Robinson*, *supra* note 32.

<sup>36</sup> *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA). <http://www.refworld.org/docid/3deb87324.html>.

<sup>37</sup> *Robinson*, *supra* note 32, ¶ 18: "For example, (a) if as a practical matter (whether for financial, logistical or other good reason) the 'safe' part of the country is not reasonably accessible; (b) if the claimant is required to encounter great physical danger in travelling there or staying there; (c) if he or she is required to undergo undue hardship in travelling there or staying there; (d) if the quality of the internal protection fails to meet basic norms of civil, political and socio-economic human rights."

<sup>38</sup> *Ibid.*

Hathaway and Foster argue for a shift towards an “internal protection alternative” and reject the current UNHCR recommendation to analyse whether it is “reasonable” to require the claimant to avail herself of the “safety” of the proposed internal destination in favour of a commitment to assess the sufficiency of protection that is accessible to the asylum seeker there.<sup>39</sup> Their analysis has been accepted by international refugee lawyers and has been coined the “Michigan approach” following an international round table organised there.<sup>40</sup>

The reasonableness test is notoriously difficult to apply, lending itself to highly subjective interpretations. Hathaway has criticised it as being “prone to arbitrariness...[and] involving an unfocused and open-ended inquiry which is not anchored in the language or object” of the Refugee Convention.<sup>41</sup> However, it is the Michigan approach, informed by international refugee law and international human rights law, which the House of Lords rejected outright in *Januzi*. The House of Lords explicitly held that reasonableness of internal relocation should *not* be evaluated on the basis of the place of relocation meeting civil, political and socioeconomic rights.<sup>42</sup> According to Lord Bingham, neither the Refugee Convention nor the Qualification Directive’s Article 8 requires a human rights approach as advanced by the Michigan Guidelines.<sup>43</sup> However, Lord Bingham was of the opinion that decisions should be guided by the UNHCR Guidelines, which do address “respect for human rights” and “economic survival”.<sup>44</sup> In essence, then, Lord Bingham advances a position that – instead of the Michigan approach’s non-discrimination principle – adjudicators should ask the question: can the claimant live a “relatively normal life”?<sup>45</sup>

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<sup>39</sup> Hathaway and Foster, *supra* note 22, 381.

<sup>40</sup> Hathaway, *supra* note 26.

<sup>41</sup> Hathaway and Foster, *supra* note 22, 387.

<sup>42</sup> Eaton, *supra* note 30, 778.

<sup>43</sup> *Januzi*, *supra* note 33, ¶¶ 15-20.

<sup>44</sup> UNHCR, *Guidelines on Internal Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1 A (2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, U.N. Doc. HRC/GIP/03/04, ¶¶ 28-30.

<sup>45</sup> Eaton, *supra* note 30, 778.

Lord Bingham's analysis illustrates some of the difficulties in advancing a human rights approach in the UK context. Reasonableness analysis, of course, forms one of the foundational principles within common law traditions. However, it is arguable that grounding the application of the internal relocation test to international human rights standards is more desirable, particularly in the case of women asylum seekers where gender-based persecution is part of their claim. This is because human rights, if appropriately used, could provide a useful standard of measurement that is internationally recognised. In particular, advances made in the area of women's rights could better inform decisions made on asylum-seeker women's claims. Arguably, it provides a less subjective test than the manner in which the reasonableness test has so far been applied, which has discriminated against women.

Undoubtedly, however, a human rights approach does not offer a panacea in refugee determination processes. There is always the additional problem of trying to make individual caseworkers in the first instance, and later adjudicators and appellate tribunal members, actually apply a certain approach. Even when higher courts have created additional criteria for the application of the internal relocation option, they have not been able to control how the criteria are ultimately applied by the decision-maker.<sup>46</sup> Indeed, the Upper Tribunal has, as evidenced from the following cases, been extremely restrictive in its application of the internal relocation option.

What is argued here is that an alternative reading is not only possible, but also *needed* when considering the specific cases where the internal relocation option has been used to deny refugee status for women fleeing gender-based persecution. The Tribunal has used its internal relocation option tests so restrictively that it places an unnecessarily high standard for the asylum-seeker women to pass. The reasonableness analysis has been particularly

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<sup>46</sup> Stevens, *supra* note 28, 329.

susceptible to the Tribunal's problematic views on the dichotomy of victimhood and agency that stem from their Eurocentric and male-centred perspective. It is finally suggested that an assessment of the relocation option, if impossible to challenge *per se*, should be grounded in international human rights standards. If applied with gender sensitivity, it could improve the current state of the internal relocation option test.

#### **V.) *HC & RC (China)* and Internal Relocation**

*HC & RC (China)* is a case involving a trafficked woman and her child from a rape. HC was born in the village of Nan Shan in Henei City in Anhui province in China, where she was looked after by her grandmother between the ages of 6, when she was orphaned, and 10, when her grandmother died. After her grandmother's death, HC left her home village and ended up in Sezhuan where she lived on the streets, scavenging for food and sometimes finding work. After moving to and working in a rural area as a domestic worker, she moved back to the city. For a few years, she moved around like this in search of work.

It was in 2005, at the age of 14 or 15, that she became involved in prostitution. She was employed washing dishes when she met a middle-aged woman who promised her well-paid work. She did not know what the work involved. She went on a journey by minibus with this woman and two other young girls and arrived at a house. After a few days she was told she had to take clients, she was being forced into prostitution. She saved money to facilitate an escape. She used this money to pay an agent believing that he would help her escape. However, this agent took her to Russia and forced her into prostitution. After getting pregnant, she was told to leave and she fled to the UK.

The case of *HC & RC (China)* evidences some of the problematic reasoning found in women's cases when adjudicators judge the "reasonableness" of the internal relocation option from a particular individualistic, Western male perspective. The adjudicators are able to come to the conclusion that the internal relocation option is possible for HC & RC by a

limited engagement with the risk of re-trafficking and lack of State protection and by viewing the “reasonableness” of the internal relocation option from a narrow perspective that fails to engage meaningfully with the realities of the violations of the applicant’s socio-economic rights.

In *HC & RC (China)*, the adjudicators narrate HC’s experiences through a simplistic vision of agency, or lack thereof, and evidence a failure to understand the nature of trafficking. This narrative has little to do with the economic realities, global inequalities, disfranchisement and the ever increasing strictness with which State borders are policed, that make up the major forces behind global trafficking of women. The portrayal of the traditional trafficking victim is echoed in the current international approaches to trafficking. The larger story of the evolving legal framework on trafficking has been problematic. As argued elsewhere, the official presentation follows the cinematic representation of trafficking as highly gendered and reproduces stereotypical narratives of femininity and masculinity.<sup>47</sup> It is these larger narratives of victimization and criminalization that mask the very real global structural inequalities that produce the conditions for trafficking.

Notably, it is this stereotypical ideal of the “proper” victim that elicits the protection approach of the Western legal machinery. It is also the way in which HC’s story is told, through the simplistic binary of victimhood and agency. She is represented as young and “naïve” as she recounts her lack of awareness that she would be forced into prostitution. The Home Office Presenting Officer (HOPO) argued that “when she [HC] was younger and more vulnerable she had not been abducted. She had ended up as a prostitute through naivety”.<sup>48</sup> The implication seems to be that if she had been abducted, she would conform to the stereotypical image of trafficking victim, completely void of agency. HC, on the other hand,

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<sup>47</sup> Rutvica Andrijasevic, “Chapter 11: The Difference Borders Make: (Il)legality, Migration and Trafficking in Italy among Eastern European Women in Prostitution,” in *Uprootings/Regroundings: Questions of Home and Migration*, Sara Ahmed *et al.* (Oxford: Berg, 2003): 251- 271, at 265.

<sup>48</sup> *HC & RC (China)*, ¶ 36.

was just young and naïve. Although she might elicit some sympathy as an innocent victim at that stage, now, after coming to the UK and “growing up” HC, according to the HOPO, does not fit this mould anymore. Now, “she is aware of the position, if it were to arise again”.<sup>49</sup> According to the HOPO narrative, she now has agency, she now *knows*, and she would not *consent* to being trafficked again. Eventually, it is the adoption of this reductive narrative based on the binary dichotomy of victimhood and agency that allows the Tribunal to reach the conclusion that she is not at risk of re-trafficking and that internal relocation option is available to her. The representation of HC’s experiences is thoroughly divorced from the economic, political and social realities that are central to her claim.

It is this kind of reasoning that shows that the adjudicators are assessing the viability of internal relocation from a particularized individualistic and economically privileged Western position. It is as if the issue is as simple as, for example, moving house from Belfast to London might be for them as privileged, white males. This reasoning ignores the multitude of factors that affect practical access to protection elsewhere in the country of origin. In reality, women face multiple issues including financial, social, linguistic, familial and logistical that affect their ability/inability to relocate to another part of the country of their origin. It is not sufficient for the adjudicators to think that the persecution can be localized; the question needs to be a holistic assessment of whether there is any realistic likelihood of access to protection of their rights.

Equally, in finding that HC & RC would not become destitute on return to China, the adjudicators use very problematic reasoning. They seem to either not want or be capable of estimating the realities of a single mother in China. They mention that “Beijing is a city where single mothers clubs have been established”.<sup>50</sup> Yet they did not reflect on whether HC could actually *access* these clubs. There is no consideration on who has access to these clubs

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<sup>49</sup> *Ibid.*, ¶ 36.

<sup>50</sup> *Ibid.*, ¶ 91.

or what their costs are. The existence of support to some people is not enough if it is not meaningfully accessible to the person in question. The adjudicators think that she can get domestic or agricultural work, but again do not consider how she will be able to get work and take care of her child at the same time as a single mother with no relatives in the country nor any economic resources of her own.

The adjudicators also brush aside the expert evidence that provides that she and her child are at a high risk of re-trafficking. The evidence from human rights NGOs is also ignored, even when they specifically addressed the lack of substantive protection from trafficking and exploitation of women “due to limited legislative definitions, administrative detention of prostitutes and policy execution”.<sup>51</sup> They even ignored a United States State Department Report, used to provide evidence for the lack of State protection, which stated that, despite the general anti-corruption measures, the PRC government “did not demonstrate concerted efforts to investigate and punish government officials specifically for complicity in trafficking”.<sup>52</sup> Key deficiencies that the Report noted were in the area of victim care and protection and tackling trafficking for involuntary servitude or forced labour which, as the expert Dr Sheehan explained, were the precise areas upon which HC and RC would rely for protection against re-trafficking.<sup>53</sup> The State Department Report further stated that protection and rehabilitation for trafficking victims was modest and that protection services remained “temporarily inadequate to address victim’s needs”.<sup>54</sup>

The adjudicators are able to side-line the evidence of a lack of protection of the rights of victims of trafficking by coming to the conclusion that HC would just not consent to being re-trafficked. The economic disadvantage and the possibilities of destitution are not addressed adequately as the adjudicators reason that she is in fact a “mere economic

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<sup>51</sup> *Ibid.*, ¶ 11.

<sup>52</sup> *Ibid.*, ¶ 15.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, ¶ 16.

migrant”. The adjudicators take the view that since she is an orphan and has lived on the streets, she “had accumulated considerable experience of fending for herself”.<sup>55</sup> This leads them to decide that she will be able to relocate and that, even if she might “encounter economic difficulties”, she will not “be permitted to sink into destitution”, as they claim that she will be able to get some assistance from the All-China Women’s Federation.<sup>56</sup> After all, the Tribunal reasons:

the humanitarian object of the Refugee Convention was to secure a reasonable measure of protection for those with a well-founded fear of persecution in their home country or some part of it; it was not to produce a general levelling-up of living standards around the world; desirable though of course that was.<sup>57</sup>

The expert evidence on the “severe discrimination and considerable long-term social and economic disadvantages” is overridden in a particularly noteworthy manner. The Tribunal considers a newspaper article consisting of an interview of six single mothers in China. It states that “[i]t may very well be that she would encounter a degree of prejudice but, nonetheless, it is clear from the articles referring to the six single mothers mentioned above that, despite whatever prejudice they encountered, they were still pleased to have had their children, which demonstrates in our view that they had not encountered overwhelming prejudice”.<sup>58</sup> It is not clear how the degree of a mother being pleased to have had her child demonstrates a correlation to the degree of societal prejudice. It is probably the case that many parents would be pleased to have had their children, no matter what society might say of them. Basing decisions on such a newspaper article trivialises the actual societal prejudice and discrimination that women face. This is doubly problematic as the adjudicators in this

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<sup>55</sup> *HC & RC (China)* ¶ 84.

<sup>56</sup> *Ibid.*, ¶ 88.

<sup>57</sup> *Ibid.*, ¶ 89.

<sup>58</sup> *Ibid.*, ¶ 88.



case also disregard the evidence from reputable human rights organisations as well as the country expert evidence.

This is despite the concerns of the expert evidence that HC's lack of family or social network and her poverty would make her a likely target for traffickers if returned to China. Dr Sheehan considered both "work and accommodation to be activities fraught with risk for a young woman alone".<sup>59</sup> Some people-traffickers would typically disguise their actions with offers of legitimate work and/or accommodation. However cautious she might be, she would remain "extremely vulnerable to the many fake employment agencies and training providers in China, which were actually fronts for people-trafficking".<sup>60</sup> This is because the only relatively safe way to find work in China is to follow the recommendation of a family member or someone from the same home village or small town, an option which the appellant did not have: she would have no choice but to go to exactly the kind of agencies that traffickers exploited.<sup>61</sup>

The UNHCR Guidelines on Relocation note that internal relocation consideration should be a holistic exercise where the decision-maker looks at the individual personal circumstances, including past persecution or the fear of it, psychological and health condition, family and social situation and survival capacities.<sup>62</sup> In *HC & RC (China)*, the adjudicators, while not referring to the Guidelines, discuss each point and arrive at a restrictive view that invites criticism of selective use of evidence and purposeful exclusion. For instance, when considering her lack of family at place of relocation, it is not considered in the meaningful way in which the expert evidence for instance provides, i.e., the discrimination and real difficulties faced by lone women without family networks. Instead,

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<sup>59</sup> *Ibid.*, ¶ 18.

<sup>60</sup> *Ibid.*, ¶ 18.

<sup>61</sup> *Ibid.*, ¶ 19.

<sup>62</sup> UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (May 2002), U.N. Doc. HCR/GIP/02/01. Baroness Hale drew upon on these Guidelines in *Secretary of State for the Home Department v K (FC) Fornah v. Secretary of State for the Home Department* [2006] UKHL 45.

the adjudicators use her lack of family to argue that – since in their view the principal reason for discrimination against trafficked women is that their families had lost face – as the appellant has no family, “this principal cause of discrimination would not arise”.<sup>63</sup> This finding completely ignores the realities of structural discrimination, and specifically discrimination that is based on gender.

The adjudicators fail to recognise the real risk of violations of HC’s socio-economic rights upon her return. The problem of not recognising systemic violations of economic and social rights, particularly in relation to women, is a reflection of a larger problem of international refugee law still seeming to consider civil and political rights violations as being of more importance. It reflects the pervasiveness of the “traditional, single, male” refugee model. By privileging violations of civil and political rights, decision-makers are at risk of discriminating against women asylum seekers, especially those persecuted by non-state actors. Recognition of social and economic rights necessitates an understanding of the context, which arguably in the case of *HC & RC (China)* was repeatedly and decisively ignored. Such restrictive reasoning goes against the object and purpose of the Refugee Convention, to apply the Convention expansively so as to afford people the widest possible exercise of their rights without discrimination.

## **VI.) *FB (Sierra Leone)* and Internal Relocation Option**

There is an underlying reason why the internal relocation option assessment disproportionately affects women’s asylum cases. The reason is because women are more likely to have been persecuted by non-state actors. There is a presumption that if the persecution is by state actors, an assessment of internal relocation is not applicable. This is the preferable presumption. In the case where non-state actors are the persecutors, the presumption that the internal relocation option is automatically applicable is problematic. Much of the persecution

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<sup>63</sup> *Ibid.*, ¶ 85.

of women is, indeed, by non-state actors due to the unequal social, economic and political situation of women in societies. In such cases, the adjudicators need to make a decision on whether there is effective, accessible and practicable state protection or whether the state of origin is unable or unwilling to offer protection to the asylum seeker. Too often, in women's cases, the adjudicators are fixated with localising the asylum seeker women's harm. In these cases, the persecution by non-state actors is constructed as something solely private and therefore localised.

FB was 16 years old from Sierra Leone when she arrived in the UK and claimed asylum. She lived in Bankala village with her parents and brothers. Her father had been killed in 1999 during the civil war. The appellant's mother was a *sowei*<sup>64</sup> and one of the women who carried out the ritual circumcision of young girls. When FB was about 16, she underwent female genital mutilation (FGM). She spent about five days recovering in a nearby village during which time she was told that her mother had died and she was to replace her mother as a *sowei*. On her return to her village she told of her reluctance to the local chief but he insisted that she go through the rituals to become a *sowei*, and that she would subsequently become one of his wives. She refused this and fled.

Initially, the Secretary of State refused her claim, as he did not accept that her contention that she would be forced into becoming a *sowei* and would be forced to marry the local chief engaged the Refugee Convention. The Adjudicator rejected a risk of further FGM and thought it would not be unduly harsh for her to relocate. She applied to the Immigration and Asylum Tribunal on the basis that the Adjudicator had made a series of legal errors. The application was dismissed on the basis that she was not a member of a particular social group, but on renewal, a reconsideration was ordered. Subsequently, her case turned on the finding of the availability of the internal relocation option.

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<sup>64</sup> The leader of a female 'initiation society' of Sande/Bondo women.

In *FB (Sierra Leone)*, situating the harm the claimant suffered in the private sphere is essential to the finding of the availability of the internal relocation option. Amnesty reports cited as evidence showed how women's civil, political, social and economic rights were being "violated on a daily basis" and that there was a "lack of formal protection" from the Sierra Leonean government.<sup>65</sup> Indeed, the Tribunal accepted that she fell within one of the five enumerated Convention grounds of membership of a particular social group.<sup>66</sup>

The problem for *FB* was that the adjudicators considered it "reasonable" for her to 'relocate'. *FB (Sierra Leone)* is symptomatic of cases in which the UK approach to reasonableness of internal relocation has resulted in a consideration that is centred on the applicant rather than State actions (or omissions). This means that the availability of the internal relocation option tends to be assessed based on the resources and opportunities available for the asylum seeker, rather than an examination of the actions of the State or its obligations.<sup>67</sup> This has led to Tribunals finding that the internal relocation option is available even when there is no indication that such protection will come from the State. For instance, in *JM (Kenya)* the adjudicators decided that the applicant could get protection from her "faith".<sup>68</sup> Even though the adjudicators undoubtedly meant the church community, this mention of the metaphysical shows the absurdity with which the adjudicators decide cases when using the reasonableness test. International refugee law, however, focuses on the State and its lack of protection. There is nothing that justifies this reliance on other actors when the State is unwilling or unable to provide protection. It is the State that has the primary obligation to provide protection and the claimant should not be expected to seek protection

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<sup>65</sup> *Ibid.*, ¶ 47.

<sup>66</sup> *Ibid.*, ¶¶ 69-71.

<sup>67</sup> Siobhan Mullally, "Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?," *International and Comparative Law Quarterly* 60, 2 (2011): 459, at 481.

<sup>68</sup> *JM* (Sufficiency of protection- IFA- FGM) Kenya [2005] UKIAT 00050.

from an entity that is not a legitimate or nominal government.<sup>69</sup> There is a need to concentrate on State responsibility in order to avoid the restrictive and inappropriate use of the reasonableness test.

Centring on the applicant, rather than the lack of state protection, coupled with simplistic binary framing of agency versus victimhood, makes it very difficult for asylum seeker women's complex experiences to be intelligible to the Tribunal. In *FB (Sierra Leone)*, just as in *HC & RC (China)*, the applicant's display of her agency, and the Tribunal's recognition of it, allowed the Tribunal arrive at the decision that she was thus able to relocate. The Tribunal in *FB (Sierra Leone)* stated: "whilst we would never wish to underestimate the vulnerability of young women in the position of the appellant, the appellant herself has shown both courage and resilience in facing her difficulties".<sup>70</sup> Furthermore, the adjudicators noted that they took "into account the particular skills that she had developed in the UK and the courage and resourcefulness she has displayed in coming here".<sup>71</sup> The adjudicators appear to insinuate that since FB has managed to come to the UK, she is equally as able to relocate to another part of her country of origin. With respect to the binary notions of victimhood and agency, there seems to be no successful position to take here. Between these binary notions, the asylum seeker cannot be at the same time vulnerable and have agency. This complexity is not acknowledged by the decision-making process.

The Tribunal considered that it would not be unduly harsh to relocate to Freetown "partly because it is a cosmopolitan urban environment where the rural chiefs do not have so great an influence and where state authority is more evident".<sup>72</sup> Again, the Tribunal did not take seriously the extensive evidence from Human Rights Watch and other country reports in the case, which demonstrated the lack of State protection for gender-based violence

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<sup>69</sup> Ninette Kelley, "Internal Flight/Relocation/Protection Alternative: Is it Reasonable?," *International Journal of Refugee Law* 14, 1 (2002): 4, at 24.

<sup>70</sup> *FB (Sierra Leone)* ¶ 83.

<sup>71</sup> *Ibid.*, ¶ 87.

<sup>72</sup> *Ibid.*, ¶ 76.

throughout Sierra Leone. FB had two children in the UK and is being sent back as a single mother with two children with neither family connections nor prospects of employment. This is something which was considered in her evidence, but did not appear to make a difference to the final decision.

As in *HC & RC (China)*, the adjudicators are able to arrive at this decision by looking at the persecution narrowly. By containing the non-state persecution within the private sphere, the adjudicators were able to *speculate* that FB could relocate to another part of Sierra Leone because the man she was being forced to marry was over 70 at the time and “might” be dead already.<sup>73</sup> In these situations the complicity of the State is not analysed in any meaningful way. The women in question are conceived as private subjects, constituted only through their relationship with these old men that “might” be dead already or, in the case of *HC & RC (China)*, through HC’s relationship with the trafficker who would not find her anymore. Conversely, these women are not subjects as themselves and in relation to their State, which is unable or unwilling to offer their rights protection. This portrayal ultimately has the consequence of delegitimising these asylum seeker women’s cases. While it fits government policy, it produces discriminatory outcomes.

## VII.) Conclusion

In 2011, on the anniversary of the Refugee Convention, the Committee of the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) adopted a statement that called for gender equality for refugees. The CEDAW Committee

call[ed] on States to recognize gender related forms of persecution and to interpret the ‘membership of a particular social group’<sup>74</sup> ground of the 1951 Convention to apply to women. Gender sensitive registration, reception, interview and

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<sup>73</sup> *Ibid.*, ¶ 62. Similar reasoning was used by adjudicators in *MD (Women) Ivory Coast CG [2010] UKUT 215 (IAC)*.

<sup>74</sup> UNHCR Executive Committee recommended this already in 1985, see Executive Committee Conclusion No. 39 (XXXXVI)-1985 on Refugee Women and International Protection, 18 October 1985, ¶ K.

adjudication processes also need to be in place to ensure women's equal access to asylum.<sup>75</sup>

The CEDAW Committee thus recognized that it is not only the interpretation of the Refugee Convention, but *gender-sensitive adjudication processes*, that are necessary for the protection of the rights of asylum seeker women.

A human rights approach, in and of itself, is undoubtedly not free from difficulties of application, as can be seen in the case of the “reasonableness test” in internal relocation assessments. However, when it comes to women's rights, a human rights approach that takes into account the feminist critiques is preferable. The discriminatory effects of the current assessment of the internal relocation option in women's refugee status determination process must be challenged. The concerns of the disproportionate effect on women of the hierarchisation of human rights and the public/private divide that enables greater impunity of women's harm needs to be taken seriously. By doing this we can hope to contribute to conversations that expose the ways in which the application of the internal relocation option has provided another means by which to restrict the movement of people.

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<sup>75</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW Statement on the Anniversaries of the 1951 Convention Relating to the Status of Refugees and the 1961 Convention on the Reduction of Statelessness*, 19 October 2011, <http://www.refworld.org/docid/4ea13f012.html>.